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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 710

IN THE MATTER OF GEORGE D. TEMPLETON ON BEHALF OF GEORGE D. TEMPLETON, JR., FOR A WRIT OF HABEAS CORPUS.

APPEAL BY PETITIONER FROM A DECISION OF THE SUPREME COURT OF THE STATE OF CALIFORNIA DENYING THE WRIT.

STATEMENT AS TO JURISDICTION.

May It Please the Court:

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 938 (United States Code, Title 28, Section 344) provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "Sec. 237 (a). A final judgment or decree in any suit in the highest court of a State in which a decision in the

suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Act of January 31, 1928, Chapter 14, 45 Stat. 54, provides:

> "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal.
>
> Sec. 2. "* * * That the review of judgments of state courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

The Act of April 26, 1928, Chapter 440, 45 Stat. 466, provides:

> "Sec. 2. The statutes regulating the right to writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

The decision sought to be reviewed was rendered by the Supreme Court of the State of California on the 14th day of August 1941. It is a memorandum decision appearing in the Minutes of said Court for said date (R. —).

The decision presumably is based on the doctrine and underlying reasons established by the same court in the

cases of *Peo.* v. *Troche,* 206 Cal. 35, and *Peo.* v. *Leong Fook,* 206 Cal. 64.

The application for appeal was presented on the 11th day of September, 1941.

C.

Nature of the Case and Rulings Below.

George D. Templeton, Jr., on whose behalf these proceedings were instituted, on or about the 8th day of August, 1932, by an information filed in the Superior Court of the County of Santa Clara, State of California, was accused of murder in language as follows:

> "the said defendant did wilfully, unlawfully, feloniously, and with premeditation and malice aforethought, kill and murder one Lilian Babcock, a human being."

On August 15, 1932 he was arraigned under said information and objected to pleading thereto on the ground, among others, that

> "the procedure imposed on the accused under sections 1016, 1020, 1026, and 1026a of the Penal Code, is in violation of Section 7 (which confers a right to a trial by an impartial jury) and section 13 (the due process of law clause) of art. 1 of the State Constitution, and also is a violation of the VI and XIV Amendments of the Federal Constitution."

Petitioner's objection was overruled and the ruling excepted to and he was required to plead; he thereupon entered the pleas of "Not Guilty" and "Not Guilty by reason of Insanity."

The arraignment proceedings appear in Appendix A herein.

On September 26th, 1932, petitioner's trial before the Superior Court of the County of Santa Clara was begun

before a jury duly impanelled and sworn on the issue of "Not Guilty".

During the trial of said issue petitioner offered evidence to prove his insanity at the time of the commission of the acts for which he stood charged; said evidence was excluded. Petitioner thereupon entered an exception and objection to the proceedings and to the exclusion of his offer of evidence which appears in detail at pages 4-5-6 of the accompanying record but the last paragraph of which is as follows:

> "If Section 1026 raises a CONCLUSIVE presumption that defendant is sane, within the meaning of section 21, it is usurpation of judicial powers, and a violation of Section 13 of Article 1 of the Constitution of the State of California, and a violation of the due process of law protected by the Federal Constitution in the VI and XIV Amendments of that Constitution."

THE CONSTITUTIONAL QUESTIONS INVOLVED.

We refer to the argument under the head of "Points and Authorities in Support of the Petition for a Writ of Habeas Corpus" comprising pages 15-47 inclusive of the record but since a literal compliance with Rule 12(1) might require an outline of the questions there argued at length, to be included in this statement, we, at the risk of sacrificing brevity, will state the questions involved as briefly and concisely as possible.

Sections 1016, 1020 and 1026 of the Penal Code of the State of California are Unconstitutional.

Sections 1016, 1020 and 1026 of the Penal Code are clearly unconstitutional for the reasons (a) that they prescribe a procedure that denies to petitioner a fair trial by an impartial jury; (b) that they deny to petitioner a trial by due

process of law; (c) that they deny to petitioner the equal protection of the law.

Section 187 of the Penal Code of California defines murder as follows:

> "Murder is the unlawful killing of a human being, with malice aforethought."

The malice required is defined in Section 188, as follows:

> "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

First degree murder, *inter alia*, is a wilful, deliberate, and premeditated killing. (Sec. 189 P. C.)

The information in the case at bar, charges that

> "the said defendant did wilfully, unlawfully, feloniously, and with premeditation and malice aforethought, kill and murder one Lillian Babcock, a human being."

To constitute the crime of murder in the first degree excluding the homicide perpetrated during the commission of certain felonies, these essential ingredients must EXIST AND BE PROVEN:

(a) Express malice, i. e., "a DELIBERATE INTENTION UNLAWFULLY" to take life; or

(b) Implied malice, i. e., "When no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart"; (a mental condition).

(c) A wilful killing;

(d) A deliberate killing; and

(e) A premeditated killing.

The Supreme Court of the State of California decided in the *Troche* case (206 Cal. 35), and the *Leong Fook* case (206 Cal. 64), that the Amendments to Sections 1016, 1020 and 1026 of the Penal Code were merely procedural changes and changed no substantive law nor right.

We therefore start with the unqualified statement by the California Supreme Court that Section 20, Penal Code, reading:

> "In every crime or public offense there must exist a union, or joint operation of act and INTENT, or criminal negligence."

and Section 21, reading:

> "The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics nor affected with insanity."

have not been repealed.

These two Sections enunciate SUBSTANTIVE law, NOT procedural law.

They enunciate this rule of substantive law that in

> "every crime there must exist a union, or joint operation of act and *intent.*" (Sec. 20).

This intent is manifested

> "by the circumstances connected with the offense, AND THE SOUND MIND AND DISCRETION of the accused." (Sec. 21).

In other words, the intent is NOT to be manifested ONLY by

> "the circumstances connected with the offense"

but also by

> "the SOUND mind and DISCRETION of the accused."
> "It is the animus with which an act is done which constituted its criminality."
>
> (*People* v. *Walsh*, 63 Cal. 167).

It, equally, is the animus with which an act is done which determines or should determine what degree of homicide has been committed and what the punishment should be if found to be murder of the first degree.

But the California system of bifurcated trial absolutely precludes the defendant from proving the "animus"—the mental condition—the motive or mentality that would disprove the existence of an "abandoned and malignant heart."

The essential ingredients of the crime of FIRST DEGREE MURDER ARE

1. Malice, express or implied, (Sec. 187-188 P. C.)
2. Wilfullness
3. Deliberation } Sec. 189 P. C.
4. Premeditation
5. A union of Act and intent (Sec. 20 P. C.)
6. The intent to be manifested by the "circumstances connected with the offense, AND THE SOUND MIND AND DISCRETION of the accused." (Sec. 21 P. C.)

All of these essential ingredients must be proven by the prosecution BEYOND A REASONABLE DOUBT.

A person "affected with insanity" is not of sound mind. (Sec. 21 P. C. P.)

> "From time immemorial the real question has always been whether the person accused of crime was capable of criminal intent. The aim of the law has always been to exempt from punishment as criminals those who, from the state of knowledge then existing,

were incapable of criminal intent. Criminal intent is an essential element of crime. If a person is mentally unable to form such intent he cannot be regarded as guilty under the law" (p. 283).

INSANITY AND LAW, by Singer & Krohn

Citing:

Youtsey v. *U. S.*, 97 Fed. 937;
U. S. v. *Lancaster*, 26 Fed. Cas. No. 15,555;
Marler v. *State*, 67 Ala. 55;
Com. v. *Hathaway*, 13 Mass. 299.

"Since a crime includes both the act and the intent, and an unsound mind cannot form criminal intent, insanity is a complete answer to a criminal charge."

INSANITY AND LAW, by Singer & Krohn, p. 284

Citing:

Braswell v. *State*, 1 Ky. Law Rep. 285.

Judge Preston's language in his dissenting opinion in *People* v. *Troche*, 206 Cal. 35, at 53, is unanswerable:

"The plea of not guilty necessarily includes within it the element of insanity. This is true not because of any legislative fiat, but because sanity is a fundamental element of all amenableness to punishment and is the prime ingredient of the criminal legislation of all civilized countries. (See Pen. Code, Secs. 20, 21, 26.) There can be no malice, deliberation or premeditation without sanity. There can be no criminal intent —indeed, no criminal act—where there is no sanity. If the jury, in ascertaining the intent of the defendant, may not consider the evidence of his insanity, it must follow that the Legislature has the power to dispose entirely with the element of intent. Yes, more is true; if the jury may not, before assessing guilt to the defendant, consider the fact that he is insane, not only may criminal intent be dispensed with, but the time-

honored and almost sacred presumption of innocence may be set at naught by the law-making power. (See State *v.* Strasburg, 60 Wash. 106 (Ann. Cas. 1912 B, 917, 32 L.R.A. (N.S.) 1216, 110 Pac. 1020)."

People v. *Troche,* 206 Cal. 35, at 53 (Dissenting Opinion).

In the *Strasburg* case, a very carefully reasoned one, the Court said:

"At the outset, then, let us recur to some fundamental principles touching the effect of the insanity of one accused of crime, at the time of committing the act charged against him, upon the question of his guilt. It is possible we may thus discover that the mental responsibility of the accused is a fact entering into the question of his guilt, upon which he has a right of trial by jury, the same as upon any other fact inherent in that question, even as the fact that the muscular action of his physical body did or did not commit the physical act charged as a crime against him. In the text of 4 Blackstone's Commentaries, pp. 20, 21, 24, it is stated: 'All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt; the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. * * * The second cause of a deficiency in will, which excuses from the guilt of crime, arises also from a defective or vitiated understanding, viz., in an idiot or a lunatic. For the rule of law as to the latter, which may easily be adapted also to the former, is that *furiosus furore solo punitur.* In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities; no, not even for treason itself.' In 1 Russell on Crimes,

p. 2, it is said: 'Without the consent of the will, human actions cannot be considered as culpable; nor where there is no will to commit an offense is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offenses.' The doctrine as understood in the United States is stated in 16 Am. & Eng. Enc. Law, 2d ed., p. 618, as follows: 'From the earliest period of the common law, no criminal responsibility could attach where the accused was so utterly deprived of reason as to be incapable of forming a guilty or criminal intent.' This is in accord with the view of our leading American text writers. 1 Wharton, Crim. Law, 10th ed. Sec. 33; 1 Bishop, New Crim. Law, Sec. 375; 1 McClain, Crim. Law, Sec. 154. Mr. Tiedeman in his work on State and Federal Control of Persons and Property (Sec. 47) says: 'It is probably the rule of law in every civilized country that no insane man can be guilty of a crime, and hence cannot be punished for what would otherwise be a crime. The ground for this exception to criminal responsibility is that there must be a criminal intent in order that the act may constitute a crime, and that an insane person cannot do an intentional wrong. Insanity, when it is proven to have existed at the time when the offense was committed, constitutes a good defense, and the defendant is entitled to an acquittal.' In the case of Com. *v.* Rogers, 7 Met. 500, 41 Am. Dec. 458, Chief Justice Shaw, speaking for the Supreme Judicial Court of Massachusetts, said: 'In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.' Mr. Freeman, the able editor of the American Decisions, in his note to State *v.* Marler, 36 Am. Dec. 402, says: 'It was always a settled rule of the common law that a person could not be legally

> punished for any act committed by him while he was insane. * * * The common law never intended to inflict punishment upon one whom it believed to be insane at the time when he did the act charged as a crime; for the law holds that a criminal intent is an essential element in every crime, and if, by reason of insanity, a person be incapable of forming any intent, he cannot be regarded by the law as guilty' " (pp. 1217-1218).
>
> *State* v. *Strasburg*, 60 Wash. 106, 119 Ann. Cas. 1912B, 917, 32 L. R. A. (N. S.) 1216, 110 Pac. 1020, 1024).

The California Supreme Court attempts to combat these arguments by saying, first, that the sound mind necessary is proven by the presumption of sanity that attaches to all men, until overcome by evidence (*i. e.*, by a preponderance of evidence) and secondly, that the accused is *not* precluded from proving his insanity as he is entitled to do that under his plea of "not guilty by reason of insanity".

The complete fallacy of the contention does not appear at once and particularly when academically argued. Just how monstrous it is only becomes apparent when encountered in the particular case.

Section 1105 of the Penal Code provides as follows:

> "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstance of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

First degree murder is punishable by death or life imprisonment as may be determined by the jury, or, from the evidence, they may find that the accused was not possessed of "an abandoned or malignant heart," which is a mental condition, and determine the homicide to be a second degree murder. But the California Supreme Court has held that

the amended sections complained of provide that evidence in mitigation of the offense; evidence that should be considered by the jury in order that it exercise its discretion so as to fix the punishment in the event of the homicide being declared first degree murder, may *not* be received IF IT TOUCHES ON MENTAL CONDITION.

Because, if the plea be "not guilty" only, then no evidence of insanity may be introduced; the accused is "conclusively" presumed sane. The testimony concerning the "circumstances of the offense" may reek with evidence proving insanity; nevertheless the jury could not consider it and would be so instructed. The necessary ingredient of a "sound mind and discretion" required by the Code itself must be presumed to exist because sanity is conclusively presumed.

The jury may "guess" or "flip a coin" or arbitrarily decide that life or death be imposed but they may not have any evidence other than the gruesome details on which to exercise their discretion. The very atrocity of the crime might tend to prove the insanity of the perpetrator but, under this horrible law, instead of it being a mitigation the jury would be compelled to use it as an argument against mercy.

Under Section 190 of the Penal Code the jury has a right to exercise its discretion in fixing the punishment for first degree murder at death or life imprisonment.

Under Section 189 the jury has the right to fix the degree of murder at Second Degree, provided it has not been committed in the perpetration of one of the felonies therein enumerated.

Section 1105 gives the accused the right to prove any mitigating circumstances, to-wit: Lack of malice express or implied (an abandoned and malignant heart); lack of intent by reason of the circumstances connected with the offense and/or a lack of sound mind and discretion.

These are substantive rights and (irrespective of the questionable right of a Legislature to take them away if it so desires) depriving an accused of these rights must be done by substantive law not a statute merely changing the established procedure.

It may be that the soundness of mind and lack of discretion in the accused are not of sufficient degree to excuse him of complete responsibility for his crime; it may be that he was actuated by a humane, lofty, self-sacrificing motive which, while erroneous in morals, mistaken in law and completely insufficient as a defense, nevertheless would be thoroughly ample to destroy the idea of an "abandoned and malignant heart" and would give the jury SOME basis on which to exercise its discretion. Yet under the sections in question the accused would be precluded from showing all this, which the law gives him the undoubted right to do.

This Supreme Court in *Davis* v. *United States,* 160 U. S. 469 at 484, 40 L. Ed. 489 at 504 states the principle contended for as follows:

> "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every ELEMENT necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict is whether upon all the evidence, BY WHATEVER SIDE ADDUCED, guilty is established beyond reasonable doubt. IF THE WHOLE EVIDENCE, INCLUDING THAT SUPPLIED BY THE PRESUMPTION OF SANITY, DOES NOT INCLUDE BEYOND REASONABLE DOUBT THE HYPOTHESIS OF INSANITY, OF WHICH SOME PROOF IS ADDUCED,

THE ACCUSED IS ENTITLED TO AN ACQUITTAL OF THE SPECIFIC OFFENSE CHARGED."

(Note: Most important, because under the bifurcated plea this is wholly denied.)

"His guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How, then, upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?" (pp. 504-505-506)

* * * * * * *

"The principle is accurately stated by Mr. Justice Cox of the Supreme Court of the District of Columbia, as follows: 'The crime, then, involves three elements, viz., THE KILLING, MALICE, AND A RESPONSIBLE MIND in the murderer. But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned,—i. e., that the defendant is innocent until he is proved guilty, and that he is and was sane, unless evidence to the contrary appears,—and considering the whole evidence in the case, still entertain what is called a reasonable doubt, *on any ground* (either as to the KILLING or the RESPONSIBLE CONDITION OF MIND), whether he is guilty of the crime of murder, as it has been explained and

defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal.' " Guiteau's Case, 10 Fed. Rep. 161, 163.

Davis v. *United States*, 160 U. S. 469, at 484, 40 L. Ed. 499, at 504.

Malice, as before pointed out, is also an essential ingredient.

It may be express or implied.

If implied by reason of an "abandoned and malignant heart" it is implied by reason of a MENTAL condition, as an "abandoned and malignant heart" can mean nothing more than a vicious and wicked mind.

If the possession of a sound mind and discretion, or sufficient of either, to enable an accused to have the necessary criminal intent (or in the case of first degree murder to form a basis for the jury to exercise its discretion in the matter of fixing the punishment), be an essential ingredient of the crime, and a fact to be proven like any other fact, to conclusively presume it would be the same as conclusively presuming guilt. Or, to put it this way: If a malicious intent be a necessary ingredient (a fact); and if it be necessary to have a sound mind and discretion in order to have an intent, it is not permitted by law to conclusively presume one in order to prove the other.

The presumption of innocence is an inherent—a constitutional right—and may not be overthrown by any statutory enactment.

If we permit the rebuttable presumption of sanity as establishing criminal responsibility ONLY to be a conclusive presumption that will in turn create a conclusive presumption that the accused is of sound mind AND not at all AFFECTED with insanity and therefore capable of forming the intent; of deliberating; of premeditating and correctly using his discretion then the presumption of innocence has been obliterated and destroyed.

Reasons for Granting the Petition.

The doctrine, whereby was affirmed the constitutional validity of the double plea of "Not Guilty" and "Not Guilty by reason of Insanity" according to which the accused, on the "not guilty" plea is conclusively presumed to have the mental attributes that are the essential ingredients of the crime, was enunciated by the Supreme Court of California in the cases of *Peo.* v. *Troche,* 206 Cal. 35 and *Peo.* v. *Leong Fook,* 206 Cal. 64. A strong and well reasoned dissenting opinion was filed by the Hon. Associate Justice John W. Preston, in both cases. Many able lawyers are in agreement with the reasoning of Justice Preston. The decision of the court is contrary to the reasoning of many other State courts particularly to the decision of *State* v. *Strasburg,* 60 Wash. 106, 119 Ann. Cas. 1912B 917, 32 L. R. A. (N. S.) 1216, 110 Pac. 1020 and is directly in conflict with the reasoning of this Supreme Court in the case of *Davis* v. *United States,* 160 U. S. 469, 40 L. Ed. 499.

We therefore have directly conflicting opinions between State courts and between a State court and this Supreme Court bearing directly on the inherent right, protected by the Constitution, to a trial by due process of law. The decision therefore decides a Federal question and we believe it to be in conflict with the applicable decisions of this Court.

The California Supreme Court has decided an important question of general law in a way deemed untenable and in conflict with the weight of authority, and contrary to the case of *Davis* v. *The United States* (*supra*).

The question as to constitutionality of the sections of the Penal Code in question has not been passed on by this Court.

Cases Believed to Sustain Jurisdiction.

Ex Parte Snow, 120 U. S. 273, 30 L. Ed. 658;
Ex Parte Kemmler, 136 U. S. 436, 34 L. Ed. 519;

Peo. v. *Zimmerman,* 278 U. S. 63, 73 L. Ed. 184, 62 A. L. R. 785;
Dreyer v. *Pease,* 88 F. 978;
Mooney v. *Holohan,* 294 U. S. 103, 79 L. Ed. 791;
Robb v. *Connolly,* 111 U. S. 624, 28 L. Ed. 542.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of Feb. 13, 1925, Jan. 31, 1928 and April 26, 1928.

Respectfully submitted,

THOS. D. AITKEN,
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APPENDIX "A".

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA

Monday, August 15th, 1932.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

GEORGE DOUGLAS TEMPLETON, JR., Defendant.

Arraignment of Defendant.

THE COURT: People against Templeton. This is the time for receipt of plea.

MR. AITKEN: The defendant pleads he is not guilty of the offense charged. I would like to state at this time, that inasmuch as a large part of one of the defenses of this accused is insanity, I would like to ask the Court for a ruling at this time whether evidence of insanity will be permitted under the plea.

I am asking it at this time rather than later, at the trial of the case, as was done in the Pantages case, when the objection was made on *voir dire;* I think it is better procedure,—it is a matter of procedure entirely within the discretion of the Court. I think it will clear up things, hasten matters generally, if the Court would make a ruling at this time.

I want to state that I am not unmindful of the decisions of our Supreme Court in the cases of People against Troche, 206 California, 35; People against Fook, 206 California, 65; and People against Hickman, 204 California, 470,—all of which cases, except the Hickman case, Justice Preston dissenting,—the decision also in People against Davis, 94 California Appeals, 192,—I think the dissenting opinion in those cases to be the correct one; and it is possible, if the question were presented differently to the Court, it might hold differently.

As a matter of fact, those cases turned more on the question of procedure rather than the substantial rights of the

defendant. We are approaching the question from an entirely different standpoint, which I would like to briefly explain to the Court, in order that your Honor can know what the question is, so as to determine whether to act upon it now, or later.

Without going into extended argument now, briefly the point that I desire to preserve in the record is this:

Wilful and deliberate intent is an essential in the crime of murder in the first degree. There can be no intent where there is no sane mind capable of forming one. It cannot be wilful where there is no will. If there is a reasonable doubt that the accused had such an intent, he must be acquitted according to the law of the land.

The right to acquittal, when a reasonable doubt exists, is the law of the land,—it has become by usage an absolute right. It is now an absolute right. A conviction, notwithstanding a reasonable doubt, is without due process of law.

The California law, in its present form, deprives this defendant of the benefit of any reasonable doubt as to his sanity, arising on the facts, and deprives him of the right to have the prosecution prove beyond a reasonable doubt, the premeditation and deliberate and wilful intent which must be proved under the charge here, and requires him to prove his insanity by a preponderance of the evidence; also, it deprives him of the right to have the jury consider his insanity or mental weakness as a mitigating circumstance in fixing the penalty; also, it deprives him of his right to have the question of his sanity and of his liability to punishment tried by an impartial jury.

I will be glad to brief the question, if the Court cares to grant the necessary time. It is a very important point. I think it has not been touched,—the cases mentioned, they are the only cases, I believe, that have been decided by the Supreme Court——

THE COURT: Were not all those cases mentioned decided after the amendment?

MR. AITKEN: They were all decided after the amendment.

THE COURT: 1927.

MR. AITKEN: Yes, decided after the amendment. Only turning on the question of right to one trial, and they de-

cided that it is one trial, although two different juries may be used. They never touched the point as to whether the accused has been deprived of his opportunity to present insanity under the first plea. Thereby raising the right to get the benefits of it.

THE COURT: The question of raising the defense of insanity under the plea of not guilty; that is the opportunity you mean?

MR. AITKEN: Yes, sir.

THE COURT: You propose to make only one plea?

MR. AITKEN: Unless we are compelled to do otherwise. I want to go further: we object to the procedure imposed on the accused under Sections 1016, 1020, 1026 and 1026-a of the Penal Code, as in violation of Section 7,—which confers a right to a trial by an impartial jury,—and Section 13,—the due process of law clause,—of Article 1 of the State Constitution, and also as a violation of the sixth and fourteenth amendments of the Federal Constitution.

That states briefly what our objection is. I think your Honor has an open mind on the question. There are all these decisions which really did not touch it, and if we were allowed an opportunity to present it in detail, we might convince your Honor of the correctness of our position.

THE COURT: Of course the Court could not at this time pass on the question of evidence, because every case will have to stand on its own ground in that regard; what might be competent one time might not be at another. We could not pass on what evidence would be admitted as to insanity at this time.

The Code is very specific as to procedure.

There are five kinds of pleas to an indictment or information:

"1. Guilty.
2. Not Guilty.
3. A former judgment of conviction or acquittal, of the offense charged.
4. Once in jeopardy.
5. Not guilty by reason of insanity."

"A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead

ıot guilty by reason of insanity' shall be conclusively pre-
ımed to have been sane at the time of the commission of the
ffense charged, provided that the Court may, for good
ıuse shown, allow a change of plea at any time before the
ɔmmencement of the trial. Defendant who pleads 'not
ıilty by reason of insanity', without also pleading not
ıilty, thereby admits the commission of the offense
ıarged."

The Section seems very plain to the Court. Do you wish
be heard in this matter?

MR. FITZGERALD: This is not the time for the matter;
ıis is the time for plea, the pleas set forth in the Code.

THE COURT: I will have to follow the Code, as long as
ıe Code stands, as long as this Section has not been
:tacked.

MR. AITKEN: The only reason I advanced it at this
me, the cases mentioned state that the Court has a very
ide latitude, discretion in the matter of procedure to be
llowed in the matter of those pleas. I thought that wait-
g until the jury is impaneled, and then making the objec-
on on *voir dire* by asking the question of a juror whether
not he would permit or would consider insanity as a miti-
ıting matter, or any defense and so on, at which time the
rosecuting Attorney would object, and then the record is
ade to preserve the question for the Appellate Court, it
ɔpears to me as rather an awkward sort of procedure be-
ıuse, if the District Attorney did not object, and the juror
ere allowed to answer the question, it would make no dif-
rence, really, because later on introducing evidence of that
nd might be blocked just the same. It is immaterial as to
hether it would be a better time now than later, as long as
e can get it in the record at some time, inasmuch as we are
troducing the point, I believe, for the first time, the way
e are, it would be a more logical matter to call it up in ad-
ıce of the trial, because we might avoid the difficulty and
pense of getting the jury together.

THE COURT: The Court will follow the procedure as
id down in the Code; it is very plain; it says: "a defend-
t who does not plead 'not guilty by reason of insanity'
all be conclusively presumed to have been sane". In the

face of that plain provision of the Code, the Court would not want to change the procedure as set out here.

MR. AITKEN: I want to ask that the record show that by our next plea, there is no waiver of rights on the part of the defendant that attach to his former plea. I understand that it is required that the accused do his own pleading,—inasmuch as he is not familiar with the language of the Code,—that is what I thought. We plead "not guilty" to the offense.

THE COURT: That is one plea, Not Guilty.

Templeton, will you stand, please. You are about to make your plea now, to the offense charged in the information, filed by the District Attorney on the 8th day of August, 1932, which charges you with a felony, to wit: murder, alleged to have been committed on or about the 26th day of July, 1932, in the County of Santa Clara, State of California, it being alleged that the defendant did wilfully, unlawfully, feloniously and with premeditation and malice aforethought, kill and murder one Lillian Babcock, a human being.

You are now to plead to the offense charged in this information. What do you plead? Your Counsel has stated one plea, but the law requires that you state it personally.

THE DEFENDANT: I plead not guilty.

THE COURT: Not guilty. Mr. Clerk, enter the plea already made, of not guilty.

CLERK NEWLIN: Yes, sir.

THE COURT: Mr. Aitken, you have another plea?

MR. AITKEN: Not guilty of the offense charged because he was insane at the time he is alleged to have committed the unlawful act.

THE COURT: Not guilty by reason of insanity.

MR. AITKEN: That is the short plea. I think I followed the statute.

THE COURT: Not guilty by reason of insanity. Have you another plea, other than you have already made?

THE DEFENDANT: Not guilty by reason of insanity.

THE COURT: Enter that plea, also, Mr. Clerk.

CLERK NEWLIN: Yes, sir.

* * * * * * *

MR. AITKEN: Under Section 1027 of the Code, we ask the appointment of alienists as provided in that section.

THE COURT: The Court will consider that. The Court will appoint alienists in conformity with that section. I will take that under consideration, Mr. Aitken.

* * * * * * *

MR. FITZGERALD: Will your Honor now make an order fixing the time for trial? (Discussion of dates and condition of the calendar).

THE COURT: If the case is set more than thirty days ahead, that will have to be waived.

MR. AITKEN: We will specifically waive any constitutional claims if the trial is longer than thirty days ahead.

THE COURT: Templeton, will you stand again?

On the request of your attorney, the time of your trial, instead of being within thirty days, which is the legal time, will have to go, to complete your defense as stated by your Counsel, beyond that period.

Do you waive the constitutional and statutory time in which you should be tried?

THE DEFENDANT: I waive that right, your Honor.

THE COURT: You do that personally. Let the record show. What is the date, Mr. Clerk?

CLERK NEWLIN: Monday, September the 19th.

THE COURT: Monday, September 19th, 1932, at ten o'clock a. m. is set as the time for trial.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No.

In the Matter of
GEORGE D. TEMPLETON
on behalf of
GEORGE D. TEMPLETON, JR.,
for a Writ of Habeas Corpus.

BRIEF IN REPLY TO MOTION TO DISMISS.

FACTS.

The facts of this case as alleged in appellant's "Petition for a Writ of Habeas Corpus" (Unprinted Record, p. 63 et seq.), have not been controverted by respondent. Respondent's statement of "facts" (Unprinted Record, pp. 112-113) are only partial. The facts of record disclose that appellant raised the constitutional points involved here.

1st. Upon his arraignment. (Unprinted Record, p. 63, 2-b Appendix.)

2nd. Upon his offer of evidence of mental condition during the trial on the plea of "not guilty". (Unprinted Record, p. 64.)

3rd. At the beginning of the trial upon the issue of "Not Guilty by Reason of Insanity". (Unprinted Record, p. 68.)

The foregoing may or may not be important. It suffices to show conclusively that at every opportunity appellant demanded his constitutional right to a trial by due process and never waived it.

THE ISSUES.

Respondent has not stated fairly appellant's contention in these proceedings. He says: "In other words, appellant demands a right to introduce in the evidence circumstances which are immaterial and irrelevant and in no way touch upon his guilt or innocence." (Unprinted Record, p. 115.)

That respondent has completely missed appellant's contention is apparent. We have shown it clearly and argued it thoroughly in our jurisdictional statement. (Unprinted Record, pp. 11-15.)

The point, briefly, is that the Sections 1016, 1020 and 1026 of the California Penal Code, together, which are claimed by the California Supreme Court to be merely procedural, in effect repeal Section 20 (substantive law) which provides that in "every crime there must exist a union, or joint operation of act and intent" and Section 21 which provides

that this intent is manifested, "by the circumstances connected with the offense, *and the sound mind and discretion* of the accused".

Sections 1016, 1020, 1026 also alter the requirements of Sections 187 and 188 of the Penal Code which define the crime of murder and require the existence of an express or implied *malice* as an essential ingredient of the crime. Implied malice may be manifested by a showing that the accused was possessed of and animated by "an abandoned and malignant heart". This is a mental condition. It must be proven by facts beyond a reasonable doubt.

These requirements are substantive law. The essentials of the crime—nothing procedural at all. The right to present evidence in mitigation is assumed by Section 1105, Penal Code.

This right is taken away by Sections 1016, 1020 and 1026 since the *only* evidence permitted by them is evidence of a complete insanity sufficient for a complete defense, i.e., a showing that the accused did not know the difference between right and wrong with relation to the act. In other words, that he was either a maniac or a hopeless idiot.

Anything in between, a weakened mentality, a misguided motive, any one of a dozen similar reasons affecting mental condition and the presence of an abandoned and malignant heart, may not be proven on the trial under the "not guilty" plea. The jury can have nothing on which to exercise its discretion towards mitigation. Under the plea of "not guilty

by reason of insanity", the accused being already either condemned to death or life imprisonment (in first degree murder trials) such evidence is valueless even though clearly sufficient to prove a mitigating condition, because insufficient as a complete defense of insanity as defined by the California courts, which require a showing that the accused was either a maniac or hopeless idiot, i.e., one who didn't know the difference between right and wrong with relation to the act.

It is obvious that the sections complained of are not merely procedural but change and interfere with substantive rights of the greatest importance.

This is well expressed in the language of Justice Houser in his dissenting opinion in the case of *People v. French*, 12 C. (2d) 720. He said (p. 777):

> "The materiality of all evidence that bore either directly or indirectly upon his state of mind at the time when the offense was committed should be most apparent."

He cited Section 195 of the Penal Code of California, the pertinent part of which reads as follows:

> "Homicide is excusable in the following cases:
> * * * * * * *
> 2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner."

He further said:

> "For aught that may be indicated therein, 'heat of passion' may be engendered by any untoward act on the part of the person whose life is subsequently taken by the accused." (p. 777.)

Justice Houser's view is supported by this court in the case that he cites, to wit: *Stevenson v. U. S.*, 162 U. S. 313, 16 S. Ct. 839, 40 L. ed. 980.

This court has not held, notwithstanding the contrary assertion by respondent, that the "penal code sections under consideration and the issues raised by appellant herein (Unprinted Record, p. 115) * * * (do) not * * * present a substantial federal question".

Respondent's assertion is made on the authority of *People v. Troche*, 280 U. S. 524. It is unnecessary to cite authority here for the proposition that a denial of a petition for certiorari or refusal to review on appeal, is not an affirmance of the decision review of which is sought.

The reading of the jurisdictional statement filed in *People v. Troche* (280 U. S. 524), is sufficient to enable one to understand why this court refused to review the case.

The case of *Shulthis v. McDougal*, 225 U. S. 561, cited by this court in its order of dismissal is not pertinent here; there is nothing in the cases of *Hull v. Burr*, 234 U. S. 712, 720, and *Norton v. Whiteside*, 239 U. S. 144, that militate against the jurisdiction of this court herein.

The record clearly shows that from the arraignment of appellant throughout his trial he repeatedly and consistently invoked the protection that was his under the Constitution of the United States.

Respondent argues that "the criminal procedure adopted by a state is a matter of its own concern *so long as it does not deny fundamental rights guaranteed by the Federal Constitution*". (Unprinted Record, p. 118.) (Emphasis ours.) True, but here those fundamental rights have been violated by a so-called procedural statute which effectively deprives appellant, and all those who rely upon a weakened mental condition and the lack of that sound mind and discretion requisite as an ingredient of criminal responsibility as either a defense or in mitigation, of such defense.

> "Clearly, if the statute be unconstitutional, as claimed, the petitioner is unlawfully held, and should be discharged."
>
> *Dreyer v. Pease,* 88 Fed. 978.

Discussing a refused instruction in *People v. Landman,* 103 Cal. 577, the court said:

> "When a specific intent is an element of the offense, no presumption of law can ever arise that will decide this question of intent."

That the jury has a right to consider the existence of mental weakness as a mitigating circumstance, has always been the law in California. It is a substantive right—a fundamental right bearing directly on the question of intent.

People v. Perry, 195 Cal. 623;
People v. Reid, 193 Cal. 491.

Nevertheless, the so-called procedural sections herein attacked, deprive an accused of the opportunity to present the evidence so that the jury can exercise its discretion prior to finding him guilty.

It is submitted that from the record on file herein, the unconstitutionality of the sections under discussion is clear. They invade the rights of all accused persons who desire to plead mental weakness as affecting the question of intent. The jurisdiction of this court is clear.

Dated, San Francisco, California,
October 22, 1941.

Respectfully submitted,
THOS. D. AITKEN,
Counsel for Appellant.

OCT 22 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 710

GEORGE D. TEMPLETON, ON BEHALF OF GEORGE DOUGLAS TEMPLETON, JR.,

Appellant,

vs.

STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

EARL WARREN,
Attorney General of California;
DAVID K. LENER,
Deputy Attorney General of California,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 710

IN THE MATTER OF GEORGE D. TEMPLETON ON BEHALF OF GEORGE D. TEMPLETON, JR., FOR A WRIT OF HABEAS CORPUS.

Motion to Dismiss Appeal.

Now Comes appellee and moves the above entitled Court to dismiss the appeal taken by appellant herein, upon the ground that said appeal does not present a substantial Federal question to this Court.

Dated at San Francisco, September 29, 1941.

EARL WARREN,
Attorney General of the State of California;
DAVID K. LENER,
Deputy Attorney General,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 710

IN THE MATTER OF GEORGE D. TEMPLETON ON BEHALF OF GEORGE D. TEMPLETON, JR., FOR A WRIT OF HABEAS CORPUS.

STATEMENT OF APPELLEE AGAINST JURISDICTION, IN SUPPORT OF MOTION TO DISMISS APPEAL.

Facts.

This appeal is taken from an order of the Supreme Court of the State of California entered the 14th day of August, 1941, denying appellant's petition for a writ of *habeas corpus*.

From the statement of appellant in support of this Court's jurisdiction, it appears that at or about the 8th day of August, 1932, he was charged in an information by the District Attorney of Santa Clara County, State of California, with murder committed with premeditation and malice aforethought; that upon his arraignment he entered a plea of "not guilty" and a plea of "not guilty by reason of insanity" under and pursuant to sections 1016, 1020 and 1026 of the Penal Code of the State of California (California Statutes 1927, pages 1148 and 1149); that upon the trial of appellant under his plea of not guilty to the infor-

mation, he sought to introduce in the evidence proof of his insanity at the time of the commission of the offense of which he was charged, but that the trial court, by force of said Penal Code sections, excluded said evidence from the record.

It further appears from the petition of appellant filed in the Supreme Court of the State of California for said writ of *habeas corpus* that in the trial of appellant under his plea of not guilty, the jury returned a verdict of guilty with recommendation of life imprisonment; that thereupon appellant went to trial under his plea of not guilty by reason of insanity and that the jury returned a verdict finding the appellant sane at the time of the commission of the crime; and that on the 2nd day of November, 1932 judgment was entered by the trial court, sentencing the appellant to life imprisonment in the State Prison at San Quentin, California.

The time for an appeal from the judgment of the trial court having long since elapsed, appellant filed the petition for writ of *habeas corpus* under consideration in the State Supreme Court.

Issues.

Appellant contends that the sections of the Penal Code, to wit, 1016, 1020 and 1026, under which he was obliged to be tried, offend the Sixth and Fourteenth Amendments to the Constitution of the United States for the following reasons:

(a) That they prescribe a procedure that denies to petitioner a fair trial by an impartial jury;

(b) That they deny to petitioner a trial by due process of law;

(c) That they deny to petitioner the equal protection of the laws.

In support of these contentions appellant argues there must exist in every crime the union or joint operation of two elements, namely, the intent and the act; that a person while insane cannot form a criminal intent; that the defense of insanity is included within the plea of not guilty, and that the refusal of the court to admit evidence of his insanity under said plea deprives him of his right to prove the absence of criminal intent.

When the argument of appellant is subjected to analysis, it reduces itself to the proposition that the Penal Code sections under consideration are incompatible with the Federal Constitution, not upon the ground that appellant was not given an opportunity to prove his insanity at the time of the commission of the offense under the so-called "right and wrong" test which has always been the law of this State, but on the ground of the refusal of the trial court to admit any evidence of partial insanity under such plea which would fall far short of that required to meet said test for the purpose of proving circumstances in mitigation of the offense charged. In other words, appellant demands a right to introduce in the evidence circumstances which are immaterial and irrelevant and in no way touch upon his guilt or innocence, and the exclusion of which deprives him of no right he had hitherto under a jury trial or which existed in common law. The departure from the old system of procedure introduced by these Penal Code sections is in form and not in substance, in procedure alone. It removed confusion which hitherto frequently resulted in obvious abuses and the resultant defeat of justice. For the convenience of the court, the Penal Code sections under consideration are set forth in the Appendix hereto.

This brings us to a consideration of the question as to whether the appeal presents a substantial Federal question in order to give this Court jurisdiction.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL OR THE STATEMENT OF APPELLANT AS TO JURISDICTION, HENCE THIS COURT HAS NO JURISDICTION TO REVIEW THE DECISION OF THE STATE SUPREME COURT.

(a) *The Penal Code Sections under Consideration and the Issues Raised by Appellant Herein Have Already Been Held by this Court Not to Present a Substantial Federal Question.*

At the outset it may be said that these Penal Code sections have been repeatedly assailed as denying due process of law and the equal protection of the law guaranteed by the Constitution of the United States and in each instance their constitutionality has been upheld by the court of last resort and the District Court of Appeal of this State in able and exhaustive opinions and in one instance by this Court, the only instance in which this Court was called upon to decide whether a substantial Federal question was presented as to the constitutionality of said Penal Code sections.

People v. *Hickman,* 204 Cal. 470;
People v. *Troche,* 206 Cal. 35;
People v. *Leong Fook,* 206 Cal. 64;
People v. *French,* 12 Cal. (2d) 720;
People v. *Cordova,* 14 Cal. App. (2d) 308, 310;
People v. *D'Angelo,* 13 Cal. App. (2d) 203, 208;
Troche v. *California,* 280 U. S. 524.

In *People* v. *Troche, supra,* one of the leading cases upon the subject, the identical Penal Code sections were assailed and the same alleged constitutional issues presented. In holding said Penal Code sections constitutional, the State Supreme Court at page 42 said:

"We are also satisfied that the present statutes in no way violate the 'due process' provisions of either

the federal or the state constitutions. The words 'due process of law' merely mean law in its regular course of administration, according to prescribed forms and in accordance with the general rules for the protection of individual rights. (*Kalloch* v. *Superior Court*, 56 Cal. 229, 240.) Due process of law is not limited to the due process of the settled usages of the past, but may include new methods of procedure unknown to the common law, provided they are in harmony with the accepted underlying principles of such procedure according to the traditions of the common law. They must be orderly and provide for reasonable notice and opportunity to be heard. (*Hurtado* v. *California*, 110 U. S. 516 (28 L. Ed. 232, 4 Sup. Ct. Rep. 111); *Twining* v. *New Jersey*, 211 U. S. 78 (53 L. Ed. 97; 29 Sup. Ct. Rep. 14, see, also, Rose's U. S. Notes).) Mr. Cooley, in his work on Constitutional Law, says (p. 224): 'When life and liberty are in question there must, in every instance, be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before the punishment can be inflicted. But the states will prescribe their own mode of proceeding and trial.' (See, also, *People* v. *Hickman*, supra.)"

In *People* v. *Troche, supra,* an appeal was taken from the Supreme Court of the State of California to this Court in *Troche* v. *California,* 280 U. S. 524. In dismissing said appeal for the want of the presentation of a substantial Federal question, this Court said:

"No. 247. *Troche* v. *California.* Appeal from the Supreme Court of California. Argued December 2, 1929. Decided December 9, 1929. Per Curiam: The Appeal is dismissed for the want of a substantial Federal question, on the authority of *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Whiteside,* 239 U. S. 144, 147. Treating the papers whereon the appeal was allowed as a petition for certiorari, as required by sec. 237 (c) of the Ju-

dicial Code, as amended by the act of February 13, 1925 (c. 229, 43 Stat. 936, 938), the certiorari is denied."

Since the issues presented by appellant have already been held not to present a substantial Federal question necessary to give this Court jurisdiction, it seems idle and a waste of time to pursue the subject further. At this risk, however, we will for the convenience of the Court draw attention to certain of the observations made by the decisions of the Supreme Court of the State of California, buttressed by references to the decisions of this Court, plainly showing that the contentions of appellant are entirely without merit.

(b) *The Criminal Procedure Adopted by a State is a Matter of its Own Concern so Long as it Does Not Deny Fundamental Rights Guaranteed by the Federal Constitution.*

In *People* v. *Hickman, supra,* the defendant was indicted for murder. He confessed its commission and entered the sole plea of not guilty by reason of insanity, under the provisions of the Penal Code here in dispute. He contended that in being obliged to follow the procedure outlined in said Penal Code sections, he was deprived of his constitutional right to a jury trial. On pages 478 and 479 of said case the Supreme Court of California said:

"Appellant further contends that the law under which he was tried violates the provisions of section one of the fourteenth amendment to the constitution of the United States (the 'due process' and 'equal protection' clause) relating to the powers of the several states. No federal question is here involved. A state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of

fundamental rights or conflict with specific and applicable provisions of the federal constitution. It is not tied down by any provision of the federal constitution to the practice and procedure which existed at common law. Subject to the limitations noted, it may avail itself of the wisdom gathered by experience to make such changes as may be necessary. (*Brown* v. *New Jersey*, 175 U. S. 172, 175 (44 L. Ed. 119, 20 Sup. Ct. Rep. 77; see, also Rose's U. S. Notes).) There is nothing in the fourteenth amendment to prevent a state from adopting a reasonable regulation of procedure in relation to jury trials. (*Frank* v. *Mangum*, supra.) As used therein the term 'due process' refers to the law of the land which derives its authority from the inherent and reserved powers of the states, exercised within the limitations of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, the greatest security of which resides in the right of the people to make their own laws and alter them at pleasure. It does not follow that merely because something has been the actual law of the land from time out of mind, it is therefore 'due process.' (*Hurtado* v. *California*, 110 U. S. 516, 529 (28 L. Ed. 232, 4 Sup. Ct. Rep. 111).) The common law is only one of the forms of law and is no more sacred than any other. As a rule of conduct, it may be changed at the will of the legislature, unless prevented by constitutional limitations. The great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. (*Munn* v. *Illinois*, 94 U. S. 113, 134 (24 L. Ed. 77).)"

Said Court continues, on pages 479 and 480:

"The fact that the new law and procedure of the state of California may appear to mark a departure from the law and procedure relating to the same subject in other states has no place in this consideration. The 'equal protection' provision of the federal constitution does not secure to all persons in the United States the bene-

fit of the same laws and the same remedies. Great diversities in these respects may exist in states separated only by imaginary lines. On one side of the line there may be a right to trial by jury, and on the other side, under like circumstances, there may be no such right. (*Missouri* v. *Lewis*, 101 U. S. 22, 31 (25 L. Ed. 989).) A state may make different procedure for trials of even the same class of offenses. The fourteenth amendment merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. (*Hayes* v. *Missouri*, 120 U. S. 68 (30 L. Ed. 578, 7 Sup. Ct. Rep. 350); *Brown* v. *New Jersey*, supra, p. 177.)"

With reference to the due process clause of the Fourteenth Amendment, as applied to state criminal procedure, the Court, in *Howard* v. *Kentucky*, 200 U. S. 164, at page 166, said:

"It must not be so construed, however, as to interfere with the State in its enactment and local administration of the criminal law, nor to confine it to any special mode of proceeding, so long as said law, as enforced by the State, affords equal protection to all persons within its jurisdiction, similarly situated, and is not violative of the fundamental and inalienable rights that are essential to the protection of life, liberty and property. Section 11, Bill of Rights, Kentucky; Davidson *v.* New Orleans, 96 U.S. 99; Fifth Amendment Const. U.S.; Holden *v.* Hardy, 169 U.S. 366; Lowe *v.* Kansas, 163 U.S. 85; Civil Rights Cases, 109 U.S. 11; United States *v.* Cruikshank et al., 92 U.S. 554; United States *v.* Harris, 106 U.S. 629; Caldwell *v.* Texas, 137 U.S. 699; Allen *v.* Georgia, 166 U.S. 137; Brown *v.* New Jersey, 175 U.S. 174; Maxwell *v.* Dow, 176 U.S. 582; Hurtado *v.* California, 110 U.S. 516; Thompson *v.* Utah, 170 U.S. 344; Ex parte Ulrich, 42 Fed. Rep. 591."

Again, in *People* v. *Troche, supra,* at page 42, the Court, citing *Walker* v. *New Mexico and S.P.R.R. Co.,* 165 U.S. 593, 596, said:

> "* * * So long as the substance of the right to trial by jury, as guaranteed by the constitution, is preserved, the procedure by which this result is reached is wholly within the discretion of the legislature, and the courts may not set aside any legislation in this respect because the form of action—the mere manner in which the questions are submitted—is different from that which obtained at the common law. (Walker *v.* New Mexico & S.P.R.R. Co., 165 U.S. 593, 596 (41 L. Ed., 837, 841, 17 Sup. Ct. Rep. 421, 422, see, also, Rose's U.S. Notes).)"

It was said in *Frank* v. *Mangum,* 237 U.S. 309, at page 339 and 340:

> "There is nothing in the Fourteenth Amendment to prevent a State from adopting and enforcing so reasonable a regulation of procedure."

(c) *Sections 1016, 1020 and 1026 of the Penal Code of the State of California do not encroach upon due process of law or the equal protection of the laws guaranteed by the Constitution of the United States.*

Under section 1016 of the Penal Code it is substantially provided the defendant may plead not guilty or not guilty by reason of insanity, or both; if he pleads "not guilty" and does not plead "not guilty by reason of insanity" he is conclusively presumed to be sane; if he pleads only "not guilty by reason of insanity" he admits the commission of the offense charged, it is a plea of confession and avoidance; while section 1020 of the Penal Code simply provides that all matters of fact tending to prove a defense may be put in the evidence under a plea of not guilty, save insanity, a former judgment or conviction and once in jeopardy,

which are the subject of special pleas. Section 1026 provides in substance that where the accused pleads both "not guilty" and "not guilty by reason of insanity", he shall first be tried under the plea of "not guilty" and if convicted will be immediately tried under the plea of "not guilty by reason of insanity". It thus appears that the defendant is deprived of no substantial constitutional right under a jury trial; that there is no substantial departure from the jury trial at common law; that he still has the right to show that he was mentally incapable of committing the offense charged. As indicated in *People* v. *Hickman, supra,* at page 477:

> "* * * The purpose of the statute is to overcome some of the abuses which have crept into the administration of justice by reason of the frequent interposition of the defense of insanity in criminal prosecutions. Its provisions are plain, and we deem it unnecessary to enter into a critical analysis or restatement of its various features to show that every essential right of one charged with crime by indictment or information has been safeguarded, and that a defendant, by availing himself of its various provisions, and entering the proper plea or pleas, may interpose and submit to the consideration of the jury every issue and every defense that has heretofore been open to him. Under proper pleas he may still submit all the evidence he could submit before the effective date of the amended statute. * * *"

On page 478 the Court continues:

> "* * * The present statute does not take away the defense of insanity, and the procedure followed in no way changed or affected the rule respecting the burden which rested on the prosecution and on the defense in this case."

Appellant, however, insists, as previously indicated, that he has a constitutional right under the plea of not guilty

to introduce evidence of a degree less than that required to satisfy the "right and wrong test"; in other words, that notwithstanding the accused could distinguish right from wrong, he had the right to introduce sanity of a lesser degree, such as partial insanity, in mitigation of the offense. That the sole test applied in the State of California is the so-called "right and wrong test", generally adopted by the States of the Union, as laid down in the celebrated *McNaughton* case, and that evidence of partial insanity which falls short of the requirements of the test is immaterial and irrelevant and may not be used for any purpose, is clearly announced in *People* v. *Troche, supra.* On pages 46 and 47 the Court said:

> "* * * In this state, in order that 'insanity may be available as a defense to a crime charged, it must appear that the defendant, when the act was committed, was so deranged and diseased mentally that he was not conscious of the wrongful nature of the act committed. If he has reasoning capacity sufficient to distinguish between right and wrong, as to the particular act he is doing, knowledge and consciousness that what he is doing is wrong and criminal and will subject him to punishment, he must be held responsible for his conduct. Although he may be laboring under partial insanity, as, for instance, suffering from some insane delusion or hallucination—still, if he understands the nature and character of his action and the consequences—if he has knowledge that it is wrong and criminal, and that if he does the act he will do wrong, such partial insanity or the existence of such delusion or hallucination is not sufficient to relieve him from responsibility for his criminal acts.' (People *v.* Willard, 150 Cal. 543, 554 (89 Pac. 124, 129); People *v.* Kerrigan, 73 Cal. 222, 225 (14 Pac. 849). See, also, People *v.* Hurtado, 63 Cal. 288). In this state 'so far as accountability to the law is concerned, there is no middle ground.' (People *v.* Perry, 195 Cal. 623, 639 (234 Pac. 890, 896).) Such is the law in many juris-

dictions. (Warner *v.* State, 114 Ind. 137 (16 N. E. 189); United States *v.* Lee, 4 Mackey (D. C.), 489 (54 Am. Rep. 293); Commonwealth *v.* Wireback, 190 Pa. St. 138 (70 Am. St. Rep. 625, 42 Atl. 542); Dean *v.* State, 105 Ala. 21 (17 South. 28); Wartena *v.* State, 105 Ind. 445 (5 N. E. 20); Kirby *v.* State, 68 Tex. Cr. Rep. 63 (150 S. W. 455).) 'Protection is always afforded in courts of law to persons of unsound mind. Distinction is made between sanity and insanity in people, but not as respects their grade of intelligence. The law does not attempt to measure degrees of intellect, nor to make distinction with respect thereto, where the power of thought and reason exists.' (State *v.* Schlaps, 78 Mont. 560, 578 (254 Pac. 858, 863).) In 14 R. C. L., page 599, section 54, it is said: 'It is the general rule that insanity, when interposed as a defense in a criminal prosecution, is either a complete defense or none at all, and it has been held that there is no degree of insanity sufficient to acquit of murder but not of manslaughter.' A valuable note on this subject is found in the case of Knights *v.* State, 76 Am. St. Rep. 83 (58 Neb. 225 (78 N. W. 508).)

"It follows, therefore, that any evidence tending to establish the insanity of the defendant under his plea of not guilty by reason of insanity at the time of the commission of the homicide, other than evidence of the immediate circumstances of the offense, would have been irrelevant and immaterial on the trial of the general issue as to the guilt or innocence of the defendant raised by the general plea of not guilty. As the statute accorded the defendant his full right, and ample opportunity to submit to a jury his plea of insanity at the time of the commission of the offense, in excuse of his act and as reason why no penalty of the law should be visited upon him, it follows that the trial court correctly excluded the evidence on the trial of the general issue."

See, also,

People v. *Leong Fook, supra,* pages 71, 72;
People v. *French, supra,* page 737.

In *People* v. *French, supra,* at pages 729 and 730 it was said:

> "It is one of the contentions of counsel that the defendant at the time he committed the homicide was in a 'muddled and deranged condition of mind and the emotions controlled his actions, and that he acted self-conscious only of a moral justification of his act.' The obvious fallacy of the proposition is that it would not have constituted a defense to a charge of murder under the law of this state even if the suggested psychological phenomena had in fact existed. It was necessary to go further. The burden was upon the defendant to prove by a preponderance of the evidence that he was insane in the sense that he was unable to appreciate the nature and the quality of his act and did not know it was wrong to commit it. * * *"
>
> "Moreover, it has long been the settled law of this state that neither emotional, moral nor partial insanity nor insane delusion nor hallucination, nor the irresistible impulse theory (the accused being conscious as to the nature and quality of his act and that it was wrongful and punishable by law), affords grounds in this state as the basis of a defense or as an excuse for the commission of a homicide. * * *" (Citing numerous authorities.)

Again, a person charged with crime is presumed to be sane until the contrary is established by a preponderance of the evidence.

People v. *Hickman, supra,* page 427.

And finally, quoting from *Bennett* v. *State* (Wis.), 14 N. W. 912, the court, in *People* v. *Troche, supra,* at page 45, said:

> "* * * The court said: 'All the issues would still be tried by a jury in the same way they are now tried. * * * It is clear, if the legislature have the power to compel the defendant to plead insanity as a defense, or waive it, then it has power to prescribe the manner of disposing of that issue on the trial so long as it

leaves the accused a trial by jury upon such issue.' (See, also Hempton *v.* State, 111 Wis. 127 (86 N. W. 596); Oborn *v.* State, 143 Wis. 249 (31 L. R. A. (N. S.) 966, 126 N. W. 737).)"

From the foregoing it appears obvious that the appellant was not entitled to introduce any evidence of partial insanity or insanity short of general insanity, in mitigation of the offense; that there is no half-way ground—he must prove such insanity which under the laws of this State constitute an entire excuse to its perpetration. Anything less does not mitigate. This has always been the law of this State and under the Penal Code sections in dispute he has that privilege. He has substantially all the privileges and rights he was entitled to before the adoption of the departure in procedure as evidenced by said Penal Code sections.

In conclusion it is submitted that no valid reason exists why this Court should overturn a line of State authorities strongly adhering to the constitutionality of these Penal Code sections under the Federal Constitution and in effect reverse itself in holding the involvement of a substantial Federal question. If said Penal Code sections at the time of the dismissal of the appeal in *Troche* v. *California*, *supra*, invaded no constitutional guarantee, they of course do not now.

It is urged that appellee's motion to dismiss the appeal be granted.

Dated September 29, 1941.

Respectfully submitted,

EARL WARREN,
Attorney General of the State of California,
By DAVID K. LENER,
Deputy Attorney General,
Attorney for Appellee.

APPENDIX.

Section 1016, Penal Code:

"There are five kinds of pleas to an indictment or information:

1. Guilty.
2. Not guilty.
3. A former judgment of conviction or acquittal of the offense charged.
4. Once in jeopardy.
5. Not guilty by reason of insanity.

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged, provided that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty thereby admits the commission of the offense charged."

(*California Statutes 1927*, p. 1148)

Section 1020, Penal Code:

"All matters of fact tending to establish a defense other than one specified in the third, fourth, and fifth subdivisions of section 1016, may be given in evidence under the plea of not guilty."

(*California Statutes 1927*, p. 1149)

Section 1026, Penal Code:

"When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or the defendant pleads only not guilty by reason of in-

sanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. If the verdict or finding be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the state hospital for the criminal insane, or if there be no such state hospital, then that he be confined in some other state hospital for the insane. If, however, it shall appear to the court that the defendant has fully recovered his sanity such defendant shall be remanded to the custody of the sheriff until his sanity shall have been finally determined in the manner prescribed by law. A defendant committed to a state hospital shall not be released from confinement unless and until the court which committed him, or the superior court of the county in which he is confined, shall, after notice and hearing, find and determine that his sanity has been restored. In the event such hearing is held in the county in which the defendant is confined, notice as ordered by the court shall be given to the district attorney of said county and also to the district attorney of the county from which said defendant was committed. Nothing in this section contained shall prevent the transfer of such person from one state hospital to any other state hospital by proper authority nor the transfer of such patient to a hospital in another state in the manner provided by law, upon order of the superior court in the county from which he was committed, or in which he is detained."

(*California Statutes 1927*, page 1149)

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 710

GEORGE D. TEMPLETON, on behalf of George Douglas Templeton, Jr.,
Appellant,

vs.

STATE OF CALIFORNIA,
Respondent.

APPELLANT'S PETITION FOR A REHEARING.

THOS. D. AITKEN,
605 Market Street, San Francisco, California,
Counsel for Appellant and Petitioner.

Table of Authorities Cited

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Comes now the above-named appellant and petitioner herein, George D. Templeton, and presents this, his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

That on the 17th day of November, 1941, this Honorable Court issued its decision in these proceedings as follows:

> *Per curiam:* The motion to dismiss is granted and the appeal is dismissed because the record does not show that the federal question presented was necessarily passed on by the Supreme Court of California. Herndon v. Lowry, 301 U.S. 242, 247; Honeyman v. Hannan, 300 U.S. 14, 18; Lynch v. New York ex rel. Pierson, 293 U.S. 52.

Counsel for petitioner, being of the unqualified belief that he was entitled to a proper record and having in mind Section 24 of Art. VI of the Constitution of the State of California which provides:

> "* * * In the determination of causes all decisions of the Supreme Court and of the District Courts of Appeal shall be given in writing, and THE GROUNDS OF THE DECISION SHALL BE STATED." (Capitals mine.)

and feeling that due process of law, at least in the State Supreme Court would be accorded petitioner, secured from this Honorable Court two thirty day extensions of time within which to file this petition or any other appropriate one, during which periods of time counsel hoped to successfully persuade said State Supreme Court, that since it was petitioner's constitutional right to a written decision which stated the reasons therefor, that Court in conformity with its constitutional duty should supply what was lacking in the form of an appropriate certificate to this Court. This the Court has refused to do.

Counsel's subsequent efforts to elicit information concerning the reasons underlying the Court's denial

in order to remedy any errors he, himself, may have committed, produced the following suggestions:

(1st) That since the denial by the trial Court to permit during the trial of the issue of "Not Guilty", the introduction of evidence for the purpose of disproving intent and implied malice by showing that the accused had neither "sound mind and discretion" nor an "abandoned or malignant heart", was mere error curable by appeal or, if acquiesced in by the State Supreme Court, mere error of law on the part of both Courts, and that it was immaterial that the procedure was required by the Code sections 1016, 1020, and 1026; that therefore there was no federal question.

(2nd) That the accused failed to prosecute an appeal to the State Supreme Court from the verdict of the jury in the trial Court.

Even if required, such an appeal would have been only a useless gesture since the State Supreme Court had already declared the law. It was not an open question in the State. An appeal just to have the Court reiterate its already declared opinion was not necessary. *Dreyer v. Pease,* 88 Fed. 978.

For the purpose of this motion let us assume that there were a dozen similar reasons that induced the California Supreme Court to deny petitioner's petition for the issuance of a writ of habeas corpus.

We respectfully suggest that the federal question of whether or not petitioner was accorded a trial by DUE PROCESS OF LAW as guaranteed him by the XIV Amendment of the federal Constitution was necessarily

decided by the Supreme Court of the State of California in the decision appealed from for these reasons:

The trial Court had jurisdiction to try the accused (Petitioner herein), ONLY by due process of law; lacking due process it wholly lacked jurisdiction.

No failure to appeal or other failure or consent could confer jurisdiction on the Court to try and condemn. It is so stated at 7 R. C. L. 1043, Sec. 76.

> "* * * the jurisdiction of a Court over the subject-matter of a cause of action must be conferred by law, and it cannot under any circumstances be conferred on a Court, as such, by the consent of the parties. It naturally follows that if jurisdiction cannot be conferred by consent, the want thereof cannot be waived by any act of the parties."

"Due process requires that there shall be notice and opportunity for hearing given the parties." *Twining v. New Jersey,* 211 U. S. 77 at 111, 53 L. Ed. 97 at 111; that an accused be given a "fair opportunity to be heard before the issues are decided" (id.), "and an adequate opportunity has been afforded him to defend". (id.)

> "The word 'hearing' contemplates not only the privilege to be present when the matter is being considered, but the right to present one's contentions, and to support the same by proof and argument."
>
> *State v. Milhollan,* 195 N. W. 292, 50 N. D. 184.

The *record* before this Supreme Court shows:

That when arraigned petitioner objected to the procedure imposed upon him and invoked the protection accorded him by the federal constitution as follows:

> "the procedure imposed on the accused under Sections 1016, 1020, 1026 and 1026a of the Penal Code, as in violation of Section 7 (which confers a right to a trial by an impartial jury) and Section 13 (the due process of law clause) of art. I of the State Constitution, and also as A VIOLATION OF THE VI AND XIV AMENDMENTS OF THE FEDERAL CONSTITUTION." (R. 63.)

Again during the trial of the issue of not guilty accused offered evidence to prove his insanity in order to disprove the presumed "intent", i.e. the existence of a "sound mind and discretion"; the presumed implied malice, i.e. the existence of "a wicked and malignant heart" (a mental condition), and to prove a weakened intellect in mitigation of punishment as permitted by Section 1105, Penal Code.

The exclusion of this proffered evidence was objected to as set forth at pages 64-66 of the record herein and he again invoked the protection of the XIV Amendment of the federal Constitution as to due process of law.

The *record* further shows that upon resumption of the trial on the plea of "Not Guilty by reason of Insanity", accused again objected to the procedure as not due process of law and again invoked the pro-

tection of the Constitution of the United States in appropriate language. (R. 68.)

Thus the requirement of this Court that the federal question or rather that the protection of the federal Constitution must be invoked in the lower Court, has been amply accomplished in this case. The Attorney General of California makes no effort to controvert any of the facts hereinabove stated.

We now arrive at the crux of our argument and the point that we have been leading up to as the main basis for this motion.

The record shows that petitioner herein was not accorded a hearing upon his trial in the Superior Court of the State of California according to the requirements of due process of law. He was not permitted to defend himself by offering evidence that would disprove the existence of the factual ingredients of the crime, without which there could be no crime. The existence of these facts was *conclusively* presumed. Nor was he permitted to offer evidence of an impaired mentality in mitigation of punishment as permitted by Section 1105, Penal Code.

Therefore due process of law was denied him. (It is now well settled that the action of a Court in the execution of its laws may constitute State action within the purview of the XIV Amendment. *Mooney v. Holohan,* 294 U. S. 103, 79 L. Ed. 791.) Therefore the Court had no jurisdiction to try and condemn him. Consequently, it must be immaterial what reasons actuated the trial Court in the first place, and

what reasons actuated the California Supreme Court in this case, the fact is undeniable that petitioner has been condemned and imprisoned without due process of law contrary to the prohibition of the federal Constitution, the protection of which was duly and timely invoked, and that *all* of *this is shown by the record.*

We earnestly urge that whatever horn of the dilemma be seized, to wit: whether petitioner's freedom be claimed as denied by reason of judicial errors of the trial Court and concurred in by the State Supreme Court without reference to Sections 1016, 1020 and 1026 of the Penal Code, or claimed as denied by virtue of those sections which are likewise claimed by the State to not infringe on the federal Constitution, the fact stands out undeniably that in either event petitioner was not accorded his constitutional right to a trial by due process of law.

The federal question *as described by counsel* both for petitioner and for the State is: whether the procedure provided for by Sections 1016, 1020 and 1026 of the California Penal Code accorded petitioner a trial by due process of law. The federal question shown by *the record* is whether petitioner had been tried and condemned by due process of law. A decision could be written by this Supreme Court which could state exactly what the accused's rights were in the premises as required by due process of law without even mentioning Sections 1016, 1020 and 1026. Such a decision would show perforce that those sections did not afford a trial by due process of law;

therefore that, they were repugnant to the XIV Amendment of the federal Constitution.

We say this not as a suggestion but to indicate that a refusal to review in these proceedings would appear to be based rather on form than substance. I know of no case when this Supreme Court, in a case involving the life or liberty of a citizen has not refused to cast aside the form for the substance.

It is true that the State Supreme Court in these proceedings has not said *in words* that it refused relief to petitioner because the procedure imposed upon him was based on Sections 1016, 1020 and 1026 of the Penal Code and that those sections were not repugnant to the XIV Amendment but it *did* deny him relief after his showing that he was tried and condemned *without due process of law* upon a procedure objected and excepted to and after his invoking the protection of the Constitution of the United States. That was error on the part of the State Court involving the question of whether or not there had been the due process demanded by the XIV Amendment. Appeal certainly must lie from that error because the federal question is involved no matter from what angle it is examined.

This Supreme Court is in accord with this view, according to the reasoning in the case of *Mooney v. Holohan,* 294 U. S. 103, 79 L. Ed. 791. This Court indicated in that case that Mooney should urge by way of petition for habeas corpus to the California Supreme Court the reasons that he was urging for

such a writ in the Supreme Court of the United States, as he should first exhaust his remedies in the State Courts. Failing then, this Court intimated that he was free to apply for a writ of habeas corpus here.

In this case we have exhausted our remedy in the State Courts where the same constitutional protection was demanded as we urge here. There is no practical difference under the circumstances between getting before this Court by an appeal or by an original petition for habeas corpus.

Exactly the same grounds exist—a deprivation of liberty without due process of law in a case where the protection of the Constitution of the United States had been duly and properly invoked.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court of California be, upon further consideration, reversed.

Dated, San Francisco, California,
February 4, 1942.

Respectfully submitted,
THOS. D. AITKEN,
Counsel for Appellant and Petitioner.

(NOTE): See Appendix to Jurisdictional Statement for verbatim copy of proceedings on arraignment.

CERTIFICATE OF COUNSEL.

I, Thos. D. Aitken, Counsel for the above-named George D. Templeton, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

Dated, San Francisco, California,
February 4, 1942.

THOS. D. AITKEN,
Counsel for Appellant and Petitioner.

No. 710. TEMPLETON *v.* CALIFORNIA. Appeal from the Supreme Court of California. November 17, 1941. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed because the record does not show that the federal question presented was necessarily passed on by the Supreme Court of California. *Herndon* v. *Lowry*, 301 U. S. 242, 247; *Honeyman* v. *Hanan*, 300 U. S. 14, 18; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52. *Mr. Thos. D. Aitken* for appellant. *Mr. Earl Warren*, Attorney General of California, for appellee.